



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

FINAL

Sergeant Eva Pena :

ORDER

Tax Registry No. 939199 :

OF

Fleet Services Division :

DISMISSAL
-----X

Sergeant Eva Pena, Tax Registry No. 939199, having been served with written notice, has been tried on written Charges and Specifications numbered 2019-21002, dated September 4, 2019 and amended on July 6, 2022, after a review of the entire record, Respondent is found Guilty.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Sergeant Eva Pena from the Police Service of the City of New York.


KEECHANT L. SEWELL
POLICE COMMISSIONER

EFFECTIVE: 1/20/23

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POLICE DEPARTMENT

September 1, 2022

-----X
In the Matter of the Charges and Specifications :

- against - :

Sergeant Eva Pena :

Tax Registry No. 939199 :

Fleet Services Division :

Case No.

2019-21002

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Josh Kleiman
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department:

Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent:

Eric Sanders, Esq.
The Sanders Firm, P.C
30 Wall Street, 8th Floor
New York, NY 10005

To:

HONORABLE KEECHANT L. SEWELL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Sergeant Eva Pena, while assigned to PSA #7, on or about September 3, 2019, while off-duty in Yonkers, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant Pena did steal property valued at \$359.00 dollars at a Macy's Department Store.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

2. Said Sergeant Eva Pena, while assigned to PSA #7, on or about September 3, 2019, while off-duty in Yonkers, New York, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Sergeant Pena did possess stolen property valued at \$359.00 dollars.

P.G. 203-10, Page 1, Paragraph 5

PUBLIC CONTACT –
PROHIBITED CONDUCT

3. Said Sergeant Eva Pena, while assigned to Fleet Services Division, on or about November 8, 2021, intentionally made a false statement during an official Department Interview when she stated that it was not her signature on a Macys New York Civil Demand Notice, Statement of Admission and Retail Trespass Complaint Form Letter, when in fact it was not true. (*As amended*)

AG 304-10, Page 1, Paragraph 1

FALSE OR MISLEADING
STATEMENTS

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 6, 2022 and July 18, 2022. Respondent, through her counsel, entered a plea of Not Guilty to the subject charges. The Department called Samantha Newton-Henry, Sergeant Steve Ortiz, Sergeant Monique McLean, Sergeant Nelson Pena, and Respondent, as witnesses. Respondent refused to testify on her own behalf, but agreed to be called as a witness by the Department. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, the Tribunal finds Respondent Guilty of each of the charged specifications. It is recommended that Respondent be DISMISSED.

ANALYSIS

It is undisputed that on September 3, 2019, Respondent was shopping at the Macy's Cross County mall location when she was stopped by Macy's Asset Protection Officer, Samantha Newton-Henry, while attempting to leave the premises. Respondent was escorted to the Asset Protection Office, whereupon she was accused of attempting to steal \$359 worth of Macy's merchandise. Respondent's handbag was subsequently emptied, revealing several items she was accused of stealing. Respondent was arrested by local authorities and charged with petit larceny. Her criminal case is pending. It is Respondent's position that she did not put these items in her handbag. Rather, she claims that Ms. Henry planted them in her bag while her handbag was left unattended in a fitting room. For the reasons set forth below, the Tribunal finds that the Department has proven by a preponderance of the evidence that Respondent did steal and possess stolen property, and that she further made intentionally false statements during an official Department interview.

Samantha Newton-Henry's Testimony:

Ms. Henry is an Asset Protection Manager for Macy's. She has worked for the Asset Protection Office since 2017, and was an Asset Protection Detective on the incident date. Due to the passage of time, she claimed at trial that she was unable to recall many of the details of her interactions with Respondent; however, Ms. Henry was shown video from store cameras (Dept. Exs. 1 & 2) related to the incident, which assisted in helping to refresh her recollection of some of the events at issue here.

According to Ms. Henry, around 7pm on the incident date, she noticed a shopper, identified as Respondent, carrying a Louis Vuitton handbag, which appeared to her to be flat. As per her training, when a woman's handbag appears flat, it is an indication of possible suspicious

behavior and she is trained to keep an eye on the individual. Accordingly, Ms. Henry began observing Respondent. She observed Respondent taking items off various clothing racks and noted the items Respondent was holding. In particular, she observed a pair of navy blue Tommy Hilfiger pants.¹ Ms. Henry left the camera room and proceeded to where Respondent was shopping in order to follow her more closely, while her colleagues continued to observe Respondent on the cameras. She and her colleagues remained in communication via her personal cell phone and a walkie-talkie.

After observing Respondent in person for some time, Ms. Henry proceeded to the nearest fitting room to perform a “sweep,” ensuring as many stalls as she could were empty of clothing. She estimated that she swept approximately twenty stalls for merchandise. Ms. Henry stated she then exited the fitting room and waited for Respondent to enter. After Respondent entered, Ms. Henry’s colleague informed her that Respondent wore white sandals, allowing Ms. Henry to identify the fitting room stall being used by Respondent.

Ms. Henry entered a neighboring stall and shut the door. After she noticed Respondent leave the stall and her colleagues confirmed that Respondent had exited the fitting room area, Ms. Henry swept the stall Respondent had been in to observe if any items were left behind. The stall was empty. Ms. Henry concluded that Respondent had removed the merchandise she had brought into the room.

Ms. Henry reacquired Respondent on the storeroom floor and watched as she proceeded to the register. Ms. Henry testified that although Respondent made a transaction at a register, it did not include the items she had observed Respondent entering the fitting room with. Ms. Henry

¹ Ms. Henry noted that on video they appeared black, but they were in fact navy blue (Tr. 85).

further observed that Respondent's Louis Vuitton handbag now appeared "to be bigger" (Tr. 47-51).

After finishing up at the register, Ms. Henry observed Respondent enter a restroom. She followed Respondent in and identified Respondent in one of the bathroom stalls by her white sandals. Ms. Henry positioned herself in an adjacent stall. After hearing a toilet flush and Respondent exiting the restroom, she entered the stall Respondent had exited. In the toilet bowl, she recognized a clothing tag. She took a picture of it (Dept. Ex. 7) with her personal cell phone and left the bathroom. (Tr. 52-54, 57, 69) Thereafter, she and her colleagues made the decision to apprehend Respondent if she attempted to leave the store with merchandise (Tr. 69).

Respondent proceeded to the exit. As she attempted to leave the store, Ms. Henry and several of her colleagues approached Respondent, apprehending her inside the vestibule. The group then proceeded to escort Respondent to the Asset Protection Office, where she was placed in a temporary holding cell (Tr. 71-73).

Once inside the office, Respondent's handbag was emptied and found to contain six items of clothing, including: (1) a pair of Tommy Hilfiger pants which resembled those she was observed carrying on video, (2) four "Guess" tops, and (3) a dress.² No receipt was found for these items, which were missing their "UPC" (Universal Product Code) tags (Tr. 81, 90-93). In order to determine the value of the items, a manager from the store took the items from the asset protection office to a cash register.

While waiting for the prices, Ms. Henry went to the camera room and prepared forms to be completed by Respondent. The forms include a "Statement of Admission" (Dept. Ex. 3), a

² The items and their values are listed on the Macy's Statement of Admission Form (Dept. Ex. 3). The form is used by the Tribunal in connection with Specifications 1 and 2 for the sole purpose of identifying the items alleged to have been found in Respondent's handbag, and not as an admission of Guilt by Respondent.

“Retail Trespass” form (Dept. Ex. 4), and a “Civil Demand Notice” (Dept. Ex. 5) (Tr. 113-15). Additionally, Respondent was provided a pedigree form by one of Ms. Henry’s colleagues (Dept. Ex. 6), a form typically given to individuals suspected of shoplifting (Tr. 119).

Ms. Henry testified that she handed Respondent the three forms she had prepared, handing them to her from the other side of the temporary holding cell door. Ms. Henry explained the forms to Respondent. If an individual refuses to sign a document, Ms. Henry writes “Refuses to Sign” on the designated line before signing the form herself (Tr. 124-26). Ms. Henry witnessed Respondent complete and sign all of the forms. She then retrieved them and signed them herself (Tr. 128). She further wrote the name of her colleague, Anthony Gordon as “witness,” who she claimed was in the camera room and had observed Respondent complete the forms via a surveillance camera (Tr. 142-46).

On cross-examination, Ms. Henry admitted that several pieces of evidence that should have been preserved were deleted or destroyed. Ms. Henry explained that when she was in the camera room observing Respondent remove items from racks, she had created a handwritten list of the items Respondent was removing. She claimed that this list was supplemented by her colleagues who continued watching the video when she left the camera room. Ms. Henry admitted, however, that the list was thrown out. When asked why, she responded, “We never keep those papers. . . . it’s a paper that we use to write down selections, and if we have confirmed what the selection were, I don’t see the relevance of keeping the paper” (Tr. 184). Ms. Henry testified that she had also taken a photograph of the list with her cellphone, but it was subsequently deleted from her phone (Tr. 263).

Video Evidence

The Department without objection submitted two videos from Macy's store cameras, which were admitted into evidence (Dept. Exs. 1, 2). The videos depict the following:

Dept. Ex. 1: Video Call Up 6

07:19:15 PM: Respondent sorts through a large clothing rack, while holding multiple clothing items draped over her left arm. The items include a black pair of pants with a white and red stripe on a pant hanger, a pink item on a shirt hanger, and a red item. There are other unidentified items piled on her arm. The items on her arm appear to have price tags affixed to them. Respondent is also carrying a Louis Vuitton handbag and a Macy's shopping bag.

07:20:56 PM: Respondent continues to browse through clothing racks. The backside of her Louis Vuitton bag comes into the view of the camera. The bag appears to be flat with the sides of the bag collapsed inward.

07:21:23 PM: Respondent takes a white shirt off its hanger before adding it to the pile on her left arm.

07:24:33 PM: Respondent removes a black and white striped shirt from a clothing rack. She holds it up to herself before adding it to the pile. She continues to look through the clothing, pulling a blue sweater from its hanger and tossing it onto the pile on her arm.

07:25:27 PM: Respondent turns to the rack behind her and removes a black and white long sleeve shirt with an applique on the front, which she takes with her; again leaving behind the hanger. She then takes a T-shirt, and removes both the shirt and the hanger. She proceeds toward a new rack of clothing where she removes a blue dress.

07:28:34 PM: Respondent enters a room [Ms. Henry described this room during her testimony as the women's fitting room located in the second floor "Women's Underwear" department. She explained that there are no cameras in the fitting room past the entryway.]

07:28:56 PM: A woman in a camouflage jacket and hat enters the fitting room [this woman was identified at trial as Samantha Newton-Henry]. Ms. Henry is carrying several clothing items and has an earpiece in her ear.

07:32:26 PM-

07:41:40 PM: Two women and multiple children come in and out of the fitting room multiple times. There is another child playing outside the fitting room on the couch and between the mannequins.

07:42:35 PM: Respondent exits the fitting room.

07:42:57 PM: Respondent is walking holding significantly less clothing than she entered with. In her left arm is the blue sweater, the black and white striped shirt with applique, a pink top, a white top, a black and white striped top, and other unidentified items. Respondent's Louis Vuitton bag appears to be bulging and no longer appears collapsed on its sides.

07:43:21 PM-

07:44:08 PM: Respondent begins hanging items on clothing racks. First, she hangs up a black shirt, followed by the blue sweater on a different clothing rack. She then proceeds to hang up an empty pant hanger on the rack (07:43:40), before depositing more items onto the rack. These items include a red sweatshirt and two blue dresses.

07:44:16 PM: After returning the various items to the rack, Respondent is left holding a black shirt, a white DKNY shirt, and a black and white striped shirt with applique.

07:49:15 PM: Respondent approaches a cash register and begins a transaction. She starts removing items from the Macy's Shopping bag she is holding and also hands over the three clothing items in her arms.

07:52:31 PM: Respondent, without looking at her handbag, unzips it, removes a few loose dollars in cash from the top of the bag and hands it to the cashier. She receives a few coins in change from the cashier.

07:54:22 PM: After finishing her transaction, Respondent proceeds to a nearby restroom.

07:55:15 PM: Samantha Newton-Henry enters the restroom.

07:59:42 PM: Respondent exits the restroom and continues to shop, looking at various clothing items, including menswear and backpacks.

Dept. Ex. 2: Video Call Up 2

08:03:36 PM: Respondent attempts to leave the premises and is stopped in a vestibule by a man (later identified as one of Samantha Newton-Henry's coworkers). Samantha Newton-Henry and another man approach from inside. Ms.

Henry takes the Macy's shopping bags and the Louis Vuitton handbag from respondent's possession.

08:05:14 PM: The group of three individuals enter the Asset Protection Office, with Respondent, and lead her into a holding cell. Samantha Newton-Henry conducts a pat down search of Respondent.

08:05:38 PM: One of the individuals in the office begins removing clothing items from Respondent's Louis Vuitton handbag. The items include a pinkish-red item, the red and white striped pants, a yellow top, an orange/pink item, and a black item. All items are removed and shown to Respondent.

08:12:00 PM: A male employee hands Respondent a form to complete while she is still inside the holding cell.

08:36:30 PM: Respondent gets up from where she is sitting inside the holding cell to speak to an unidentified individual on the opposite side of the door. The individual hands Respondent a clipboard with multiple papers that Respondent looks over. Respondent fills out the forms and returns them to the person on the other side of the cell door.

08:52:46 PM: After showing someone her phone, Respondent exits the holding cell out of view of the camera.

08:59:11 PM: Respondent returns to the holding cell and is seated.

09:20:35 PM: Yonkers Police arrive and enter the holding cell. A female officer pats Respondent down and she is subsequently handcuffed and arrested.

Sergeant Ortiz's Testimony:

Sergeant Steve Ortiz, an investigator assigned to Patrol Borough Bronx Investigations Unit, testified that he and his partner, Sergeant Lawyerr, were assigned by their duty captain, Captain Frazier, to meet Respondent at the Yonkers Police Department after her arrest. Upon arrival, Respondent was released on a desk appearance ticket for petit larceny. Sergeants Ortiz and Lawyerr drove Respondent from the Yonkers Police Department back to her car, located in the Macy's parking lot. During the car ride, Sergeant Ortiz did not recall having a conversation

with Respondent, aside from small talk regarding next steps, such as driving her car to PSA 7,³ where the officers would obtain her gun, shield, and identification card. (Tr. 95-97)

Sergeant Nelson Pena's⁴ (NP) Testimony:

Sergeant NP works with the Internal Affairs Bureau as an investigator assigned to the administrative portion of Respondent's petit larceny case (Tr. 293-94). During his investigation, Sergeant NP conducted an official department interview of Respondent. The interview was conducted on November 8, 2021. Sergeant NP and Respondent were joined by Lieutenant Chernyak and Respondent's attorney (Dept. Exs. 8 & 9). During Respondent's interview, she explained that she had interacted with Ms. Henry in the fitting room after stepping out of her stall to help someone. When Respondent reentered her stall she found Ms. Henry there and the items she had been trying on missing (Tr. 294-97). When asked whether she had any clothing in her handbag prior to entering the fitting room, Respondent replied, "No." She further stated that her bag was open after seeing Ms. Henry in her stall. Despite having personal items in her bag, such as her shield, ID, and wallet, she admitted that she did not check her bag to ensure her property was secure after Ms. Henry allegedly left her stall (Dept. Ex. 8 at 14:56-20:07).

Later in her interview, Respondent described an assault perpetrated by Ms. Henry while Respondent was in a Macy's bathroom. Respondent asserted injuries to her arm from the assault, but she did not produce any evidence of her injuries. Respondent claimed that she informed Sergeants Ortiz and Lawyerr of this assault. Sergeant NP testified that he interviewed Sergeants Ortiz and Lawyerr concerning Respondent's allegations of an assault perpetrated by Ms. Henry. Both officers denied that Respondent had made any statements about an assault (Tr. 372, 378).

³ Sergeant Lawyerr, who also testified at trial, corroborated Sergeant Ortiz's testimony, stating that he did not recall having a conversation with Respondent, nor did he recall her speaking to anyone else while in the car (Tr. 286-91).

⁴ No relation to Respondent.

*Respondent's Testimony:*⁵

Respondent testified that on September 3, 2019, she entered the Macy's Department Store at the Cross County Mall, carrying her personal Louis Vuitton bag and two other bags, one of which contained a pair of shoes she wanted to exchange, and another that contained two long sleeve shirts she wished to return. Inside her Louis Vuitton bag was her personal cell phone, multiple sets of keys, a makeup bag, a wallet containing credit cards, over \$1,000 in cash, and her Department shield. No clothing was in her Louis Vuitton bag when she entered the store (Tr. 458-59; Dept. Ex. 9 at 7-8, 15). After exchanging the shoes, she proceeded upstairs to browse women's clothing. Upon retrieving items to try on, she proceeded to a fitting room.

While trying items on in the fitting room, she became aware of a mother and daughter in the stall next to her. Respondent recalled the daughter running around and the mother stating to another woman, "Do me a favor. Take her outside. She's driving me crazy." After the woman left with the daughter, the mother exclaimed aloud that she could not zip up her dress, so Respondent offered to help her. Respondent stepped out of the stall she was occupying, leaving the clothing she was trying on and her handbag unattended (Tr. 405-07).

When Respondent returned to her fitting room, a woman she later identified as Ms. Henry was leaving the room. Respondent asked Ms. Henry why she was in her stall and what happened to some of the clothing items she had left there. Ms. Henry only responded, "I fucking took care of it." Wanting to be the "better person," Respondent continued to try on what was left and exited the fitting room. As she was leaving, she stated that the mother from the stall next door was yelling, "How the fuck you go into that lady's fitting room without asking her permission"

⁵ Respondent's version of events is also based on statements she made at her official Department interview on November 8, 2021. The interview was entered into evidence (Dept. Ex. 9) without objection.

(Tr. 407-09). Respondent did not recall how many items she brought with her into the fitting room compared to the amount of items missing after Ms. Henry exited her stall (Tr. 411-15).

After some more browsing, Respondent proceeded to a cash register. She purchased some of the items that she had brought into the fitting room after returning two items (Tr. 415).

After completing her transaction, Respondent went to the restroom. After leaving a bathroom stall to wash her hands, she again encountered Ms. Henry. She recalled washing her hands when Ms. Henry came up next to her and stated, "I hate fucking cops," without any prompting. Respondent replied, "So I guess this is personal." Ms. Henry then spit at her and punched her. At trial, Respondent could not recall where Ms. Henry had punched her. At her official Department interview, however, Respondent stated that Ms. Henry had punched her in the face. (Tr. 416-17; Dept. Ex. 9 at 39)

Respondent testified that a physical altercation ensued during which several punches were thrown. Respondent did not identify herself as a police officer, make an arrest, or contact 911. Respondent explained that it happened "so fast" and "I just wanted to leave the store" (Tr. 419, 460). Upon being shown video of her continuing to browse on the retail floor after leaving the restroom, Respondent explained that the reason she did not immediately leave the store was that she wanted to make sure Ms. Henry was no longer following her (Tr. 461-62).⁶

Upon being apprehended, Respondent did not inform the other workers that she was assaulted by Ms. Henry. Once in the Asset Protection Office, however, she claimed she spoke with one of Ms. Henry's coworker, Brian Swift, and indicated to him that the items in her bag were planted as he removed them from her handbag. Respondent recalled Mr. Swift responding, "We don't know how many items you have inside of your bag. We're going to multiple it by

⁶ At her official Department interview, Respondent explained that she stopped to look at book bags after leaving the bathroom and before leaving the store because her oldest daughter wanted one for school (Dept. Ex. 9 at 45-46).

five. Whatever that amount comes out to, if you pay Macy's that amount, we'll just open the door and let you go home." (Tr. 424-28). She claimed that Brian Swift was the only Macy's employee she spoke with once she was escorted to the holding cell in the Asset Protection Office.

While in the holding cell, she was given a pat down form and a pedigree information form (Dept. Ex. 6) to complete. According to Respondent, she completed the top portion of the pedigree form. Upon reviewing the form at trial, she determined that portions of the form were altered. Respondent indicated she wrote her father's name "Dagoberto Pena," but it now reads "Dago Pena." She further indicated that she had written 5'2" for her height, but it had been changed to 5'4" (Tr. 427-33). As to the "Statement of Admission" (Dept. Ex. 3) "Retail Trespass" (Dept. Ex. 4), and "Civil Demand Notice" forms (Dept. Ex. 5), Respondent testified she did not sign any of these forms. (Tr. 441-44)

After being arrested, Respondent indicated that the Yonkers Police Department informed her Duty Captain of her arrest. When she was picked up by Sergeants Ortiz and Lawyerr, Respondent indicated she spoke with Sergeant Ortiz while in their vehicle about being assaulted by Ms. Henry. She recalled showing him her bruises from the altercation as well (Tr. 454-57). Respondent further claimed that she informed the responding Duty Captain about the assault, but he responded, "[I] don't want to hear it." She also claimed that she told a sergeant at PSA 7 (Tr. 462).

Findings

The Department has proven by a preponderance of the credible evidence that Respondent did steal and possess stolen property of the Macy's Department Store on September 3, 2019. Specifically, the video evidence depicts Respondent shopping at Macy's, removing clothing

items from clothing racks and draping them over her left arm, which also holds a Louis Vuitton handbag. The handbag appears deflated, suggesting it is rather empty. One of the items Respondent is depicted holding in her left arm, at the beginning of the video, is a pair of navy blue pants with a white band around the waistline and a clothing tag hanging from the item. Respondent is then depicted entering a dressing room.

Upon leaving the dressing room, Respondent is no longer holding the striped navy blue pants and her Louis Vuitton handbag no longer appears deflated, but to bulge slightly. She is then depicted placing several clothing items back on clothing racks on the retail floor, none of which include the navy blue pants. During this portion of the video, she takes the time to take an empty clothing hanger she is holding, place a shirt she is holding on it, and re-hang the hanger on the rack. Another hanger, however, an empty pants hanger, she places back on the rack without re-hanging any clothes on it. She proceeds to a cash register and does not present any pairs of pants for payment. She then proceeds to a bathroom. Upon leaving the bathroom, she proceeds to the exit where a group of Macy's loss prevention agents stop her.

After being escorted to the loss prevention office, the Louis Vuitton handbag is opened on camera. One of the items removed is a pair of navy blue pants with a white stripe around the waist. It no longer has a tag on it. The item is nevertheless identified as a Macy's product, specifically a "Tommy Hilfiger Sport Striped-Waist 7/8-Length Pants." One of the loss prevention agents present that day, Ms. Samantha Newton Henry, who testified at trial, stated that she followed Respondent into the bathroom before Respondent left the store. After hearing Respondent flush the toilet and leave the restroom, Ms. Henry entered the bathroom stall Respondent had been in and noticed one or more clothing tags in the toilet. She took a picture of the toilet bowl. In the bowl, a white tag is barely visible; however, clearly visible are the

characters “7/8.” The Tribunal finds that the video evidence, along with the corroborative testimony of Ms. Henry, establishes the misconduct charged in Specifications 1 and 2.

The Tribunal further found Respondent’s testimony that she had been involved in a verbal dispute with Ms. Henry while she was in a dressing room and had a significant physical altercation with Ms. Henry while she was in a bathroom, during which punches were thrown and she was injured, to be unlikely, implausible, and bizarre. No evidence supported these recriminations and certain evidence disproved the likelihood of their occurrence. For instance, the video evidence portrays Respondent smiling as she is leaving the dressing room and, as Respondent leaves the bathroom, she shows no evidence of discomfort or paranoia, continuing to browse store products in the same manner she did before. Furthermore, when she is escorted by Ms. Henry to the asset protection office there is no indication of any animosity between them. Respondent claims she told the responding members of the service and a Duty Captain about the assault, but none corroborated this assertion. The Tribunal found two of these officers, Sergeants Ortiz and Lawyerr, who testified at trial, to be credible and to have no motive to lie concerning their interaction with Respondent. Accordingly, the Tribunal finds Respondent’s version of events to lack credibility and to be refuted by a preponderance of the credible evidence.

In a motion to dismiss filed after trial, Respondent claimed that the Tribunal lacked “subject-matter jurisdiction” due to General Obligations Law § 11-105, which empowers “mercantile establishment[s]” to seek civil settlements from those who are caught stealing from their stores. The statute prohibits the admissibility of “[a]ny testimony or statements of the defendant” or “any evidence derived from an attempt to reach a civil settlement” “in any other court proceeding relating to such larceny.” Contrary to Respondent’s interpretation of this law

and the supporting precedent,⁷ the law in no way precludes this disciplinary hearing. Rather, at best, it limits the admissibility of certain evidence during a “court proceeding.” While it is unlikely that this Tribunal, which exists to render employment-related recommendations to an employer, would constitute a “court” within the meaning of the General Obligations Law, this Tribunal, nevertheless, finds any statement made by Respondent on the forms presented to her by Macy’s while she was in the asset protection office (Dept. Exs. 3, 4, 5) to be unnecessary to the adjudication of Specifications 1 and 2. Rather, the video evidence, as corroborated by the testimony of Ms. Henry, credibly speaks for itself and establishes the misconduct charged.

As to Specification 3, which charges Respondent with falsely claiming that she did not sign three forms Macy’s presented to her, the Tribunal finds that even if it were considered a “court” within the meaning of the General Obligations Law, the prohibition on admissibility contained within §11-105(12) would not apply because the subject of Specification 3 is not a “larceny,” but whether Respondent lied at an official Department interview. Furthermore, the alleged lie does not concern whether a larceny was committed, but whether Respondent affixed her signature to the forms. Accordingly, Respondent’s Motion to Dismiss is denied.

The Department alleges, as charged in Specification 3, that Respondent lied during an official Department interview when she stated that she did not sign three forms: (1) Macy’s Statement of Admission (Dept. Ex. 3), (2) Retail/Trespass Complaint Form Letter (Dept. Ex. 4), and (3) Macy’s New York Civil Demand Notice Prosecuted (Dept. Ex. 5). Respondent was adamant at her official Department interview, and during her testimony, that she did not sign

⁷ In *Orellana v Macy’s Retail Holdings, Inc.*, 53 Misc 3d 622 (Sup Ct, NY County 2016), the court granted a preliminary injunction prohibiting Macy’s from “demanding, requesting, collecting, receiving, or accepting any payments in connection with General Obligations Law § 11-105, from suspected shoplifters while they are detained under Macy’s custody pursuant to General Business Law § 218.” After the case was removed to federal court, the Southern District of New York refused to enforce the Supreme Court’s preliminary injunction (*see* Civil Docket for Case#: 1:17-cv-05192-NRB [*Orellana et al. v. Macy’s Retail Holdings, Inc. et al.*], at Entry #41 [Memorandum and Order] [July 10, 2018]). The case eventually settled and was dismissed (*Id.* at Entry #81).

these forms (Tr. 440-44). At her official Department interview, Respondent further claimed that she was not presented with these forms (Dept. Ex. 9 at 152, 154, 158-60). Ms. Henry credibly testified that she handed these forms to Respondent and watched her fill them out and sign them. She testified that had Respondent refused to sign any of the forms she would have written “refused to sign” on them (Tr. 126, 150). The video evidence depicts Respondent filling out three forms. The video further shows Respondent writing in particular places on the forms that matches those portions of the documents left for Respondent to complete (*see* Dept. Ex. 2 at 08:37:27-08:37:42 [Statement of Admission], 08:37:59-08:38:06 [Retail/Trespass Complaint Letter], 08:38:16-08:38:40 [New York Civil Demand Notice Prosecuted]). Based on the testimony of Ms. Henry, as corroborated by the video evidence, the Tribunal finds that the Department has proven Specification 3 by a preponderance of the evidence.

Accordingly, the Tribunal finds Respondent Guilty of each of the three specifications with which she is charged.

PENALTY

In order to determine an appropriate penalty, this Tribunal, guided by the Department’s Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent’s employment history was also examined (*see* 38 RCNY 15-07). Information from Respondent’s personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 11, 2005, has been found guilty of stealing and possessing stolen property and making false statements during an official

Department interview. The Department Advocate has recommended Termination. The Tribunal agrees.

The presumptive penalty for engaging in conduct that would be classified as a Petit Larceny under New York State criminal law is Termination, with a mitigated penalty of Forced Separation. The presumptive penalty and mitigated penalty for intentionally making a false official statement is the same. While misconduct equivalent to a petit larceny may result in an offer of forced separation where the conduct is off-duty and constitutes an aberration in an otherwise admirable career, among other possible mitigating factors (*see, e.g.*, Disciplinary Case No. 2017-17713 (July 6, 2020); Disciplinary Case No. 2016-16428 [May 8, 2019]; Disciplinary Case No. 2016-15629 [Dec. 6, 2017]; Disciplinary Case No. 2015-13051 [Sept. 12, 2016]), where no mitigating factors exist, or an aggravating factor exists, the appropriate penalty remains Termination (*see, e.g.*, Disciplinary Case No. 2017-17199 [Sept. 30, 2021] [The subject officer's misconduct was "compounded by dishonesty."]; Disciplinary Case No. 2014-12548, [Dec. 2, 2015] ["[T]he video evidence in this case indicates that Respondent did not fully testify truthfully."]).

Here, the Tribunal finds several aggravating factors that not only warrant Termination, but demand it. Foremost among them is Respondent's efforts to concoct a false narrative and invent facts. Indeed, it seemed at trial that there was no one Respondent was not willing to throw under the proverbial bus to save her skin. Respondent claimed that Ms. Henry invaded her dressing room to plant merchandise in her handbag and later approached her in a restroom to communicate to her "I hate fucking cops" and deliver a beat down. Respondent continued to weave her tale by testifying that she told no less than four members of the service of this assault, all of whom, with no motive to do so, willfully ignored her report and failed to make any efforts

to document it. Two of these members of the service testified credibly at trial that Respondent made no such reports to them and video evidence failed to support her claims of an assault. The Tribunal found Respondent's credibility as to these accusations to be baseless, self-serving, and malicious. Even in the face of overwhelming evidence of her guilt, Respondent sought to lie, to falsely accuse Macy's employees and fellow members of the service, and to provide this Tribunal with no indication that she was capable of continuing to serve as a sworn police officer.

In addition to stealing merchandise, Respondent intentionally made false official statements upon being formally questioned about the theft. Such misconduct carries a presumptive penalty of Termination because it constitutes a disqualifying act. An officer who lies under formal inquiry proves themselves incapable of one of most important tasks of a police officer – to credibly bear witness and faithfully report their observations and actions. An officer found to have lied under such circumstances is forever impeachable and may risk not only the integrity of the police work they are responsible for, but, by mere association, the honest work of others. This is a reality and risk that the people of the City of New York should not be burdened with in their efforts to safeguard their city. The Tribunal also found that Respondent intentionally engaged in the charged misconduct; therefore, she should have known of the consequences of her actions if made to answer for them, as she is here.

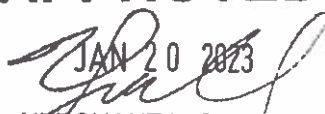
For the foregoing reasons, the Tribunal recommends that Respondent be DISMISSED from the New York City Police Department.

Respectfully submitted,



Josh Kleiman
Assistant Deputy Commissioner Trials

APPROVED



JAN 20 2023
KEECHANT L. SEWELL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
SERGEANT EVA PENA
TAX REGISTRY NO. 939199
DISCIPLINARY CASE NO. 2019-21002

Respondent was appointed to the Department on July 11, 2005. On her three most recent annual performance evaluations, she received 3.5 overall ratings of “Highly Competent/Competent” for 2019, 2020, and 2021.

In 2011, Respondent forfeited twenty (20) vacation days after pleading guilty to wrongfully utilizing Department computers for unauthorized inquiries on two occasions, being present during an incident wherein Respondent’s mother offered a complainant financial compensation related to a criminal case where her brother was the defendant, and failing to notify her Commanding Officer of a change in residence.

In connection with the instant matter, Respondent was suspended without pay from September 3 to October 5, 2019. She was placed on Level 2 Discipline Monitoring on October 15, 2019. Monitoring remains ongoing.

For your consideration.

Josh Kleiman
Assistant Deputy Commissioner Trials